

The Fair Labor Standards Act

The New FairPay Rules

A. Introduction

1. The FLSA requires that most employees in the United States be paid at least the Federal minimum wage and overtime pay at time and one-half their regular rate of pay after 40 hours in a workweek.
2. The FairPay rules are concerned with the “White Collar” exemptions.
 - a. FLSA provides an exemption from both minimum wage and overtime pay for employees employed as bona fide executive, administrative, professional and outside sales employees. FLSA also exempts certain computer employees.

B. The Purpose of the New Rules

1. The new rules update outdated language in the FLSA regulations in order to simplify the regulations making them easier to understand. For example, the old regulations discuss jobs such as straw bosses and legmen.
2. The new rules increase the minimum salary level required for an exemption in order to better reflect the modern economy.
3. The new rules define words included in the job duties of executives, administrators, and professionals in order to avoid some of the confusion as to which if any exemption an employee may qualify for.

C. Effective Date

1. The effective date of the FairPay rules is 120 days after publication in the Federal Register.

D. Employees Affected

1. New section 541.3(a) states that exemptions do not apply to manual laborers or other “blue collar” workers who perform work involving repetitive operations with their hands, physical skill and energy. Thus, for example, non-management production-line employees and non-management employees in maintenance, construction and similar occupations such as carpenters, electricians, mechanics, plumbers, iron

workers, craftsmen, operating engineers, longshoremen, construction workers and laborers have always been, and will continue to be, entitled to overtime pay.

2. New section 541.3(b) states that the exemptions do not apply to police officers, fire fighters, paramedics, emergency medical technicians and similar public safety employees who perform work such as preventing, controlling or extinguishing fires of any type; rescuing fire, crime or accident victims; preventing or detecting crimes; conducting investigations or inspections for violations of law; performing surveillance; interviewing witnesses; interrogating and fingerprinting suspects; preparing investigative reports; and similar work.

E. Employees must meet **three tests** in order to qualify for exemption

1. The Salary Level Test. An exempt employee must earn a minimum amount.
2. The Salary Basis Test. The minimum amount must be paid on a salary basis.
3. The Job Duties Test. Exempt employees must perform certain executive, administrative or professional job duties set forth in the regulation.

F. Changes to the Salary Level Test

1. The minimum salary level required for exemption under the new rules is **\$455 per week**, which must be paid “free and clear.”
 - a. Free and clear means that the \$455 can not include the value of any non-cash items that an employer may furnish to an employee, like board, lodging or other facilities (for example, meals furnished to employees of restaurants.
 - b. The equivalent of the \$455 per week salary level is \$910 for biweekly pay periods; \$985.83, for semimonthly pay periods; and \$1,971.66, for monthly pay periods.
2. The new rules for the Highly Compensated Test: Highly compensated employees performing office or non-manual work and paid total annual compensation of **\$100,000** or more, which must include at least \$455 per

week paid on a salary or fee basis, are exempt if they customarily and regularly perform at least one of the exempt duties or responsibilities of an exempt executive, administrative or professional employee identified in the standard tests for exemption.

- a. The phrase “**customarily and regularly**” means a frequency that must be greater than occasional but which may be less than constant. Tasks or work performed “customarily and regularly” include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.
 - b. If a highly compensated “white collar” employee customarily and regularly performs one or more exempt duties, detailed analysis of all the job duties performed is not necessary. For example, an employee may qualify as a highly compensated executive employee if the employee customarily and regularly directs the work of two or more other employees, even though the employee does not meet all of the other requirements in the standard test for exemption as an executive.
 - c. Special rules allow for prorating the annual compensation if employees work only part of the year, and allow the employer to make one final payment within one month after the end of the year to satisfy the required \$100,000 annual amount. Employees whose compensation does not equal \$100,000 by the end of the year can still be tested for exemption on the standard duties tests.
3. Under the old rules the minimum salary level ranged from \$155 per week to \$250 per week.
 - a. Under the existing regulations, an employee earning only \$8,060 per year may be classified as an “executive” and denied overtime pay. By comparison, a minimum wage employee earns about \$10,700 per year.

G. Changes to the Salary Basis Test

1. “Salary basis” means that an exempt employee must regularly receive, each pay period and on a weekly or less frequent basis, a “predetermined amount” of compensation.
2. That compensation cannot be reduced because of changes in quality or quantity of work performed.
3. Must pay full salary for every week in which any work is done.
4. If the employee is ready, willing and able to work, deductions may not be made for time when work is not available.
5. 7 Permitted Deductions (aka 7 exceptions to the “no pay-docking” rule)
 - a. Absent from work for a full day or more for personal reasons, reasons other than sickness or disability.
 - b. Absence from work for 1 or more days due to sickness or disability if deductions made under bona fide plan, policy, or practice of providing wage replacement benefits for these types of absences.
 - c. To offset any amounts received for jury fees, witness fees, military pay 4. Penalties imposed in good faith for violating safety rules of major significance.
 - d. **Unpaid disciplinary suspension of 1 or more full days imposed in good faith for violations of work place conduct rules.**
 - e. **Proportionate part of employees full salary may be paid for time actually worked in 1st and last weeks of employment**
 - f. **Unpaid leave taken pursuant to Family and Medical Leave Act.**
6. The Effect of Improper Deductions
 - a. If the facts show that the employer had an **actual practice** of making improper deductions from salary, the exemption will be lost.
 - b. Factors considered when determining an actual practice include, but are not limited to:

- the number of improper deductions;
 - the time period during which the employer made improper deductions;
 - the number and geographic location of both the employees whose salaries were improperly reduced and the managers responsible for making the improper deductions;
 - whether the employer has a clearly communicated policy permitting or prohibiting improper deductions.
- c. **Safe harbor** for employers who have a clearly communicated policy prohibiting improper deductions. If an employer satisfies the following 3 requirements, the exemption will not be lost unless the employer willfully violates the policy by continuing to make improper deductions after receiving employee complaints.
- (1) has such a clearly communicated policy which prohibits improper deductions and includes a complaint mechanism
 - (2) reimburses employees for any improper deductions, and
 - (3) makes a good faith commitment to comply in the future
- d. **Clearly communicated policy** is a written one distributed to employees before the improper pay deductions occur.
- Providing a copy of the policy to employees when they are hired
 - Publishing it in an employee handbook or distributing it to employees over the employer's Intranet.
- e. Isolated or inadvertent improper deductions will not result in the loss of exempt status if the employer reimburses the employee for the improper deduction.
7. An employer may provide additional compensation besides the minimum guaranteed salary to an exempt employee without losing the exemption or violating the salary basis test.
8. An employer may pay on hourly, daily or shift basis without losing the exemption if:

- a. Employer guarantees that at least \$455/week to be paid regardless of days or hours worked
 - b. A reasonable relationship exists between guaranteed amount and amount actually earned (or amount guaranteed = employee's actual earnings at assigned hour or daily rate)
9. Administrative and Professional employees can be paid on a **fee basis** (agreed sum for single job). Fee payment meets the minimum salary requirement if the fee is at a rate that would amount to \$455/week if that employee worked 40 hrs. per week.
- a. Not for non-unique jobs repeated indefinite # of times
10. Salary level and salary basis tests do not apply to outside sales employees, doctors, lawyers, teachers, and some computer related occupations paid at least \$27.63/hr

H. Changes to the Job Duties Test

1. The **Executive Exemption** applies only if the following three duties requirements are met: (1) the employee's **primary duty** must be **management** of the enterprise or a **customarily recognized department or subdivision**; 2) the employee must **customarily and regularly** direct the work of **two or more employees**; and 3) the employee must have the authority to hire or fire other employees, or have her suggestions and recommendations as to hiring, firing, advancement, promotion or any other change of status be given **particular weight**.
- a. The new rules define **primary duty** and give factors to determine whether one meets this standard. Primary duty means the principal, main, major or most important duty that the employee performs. An employee's primary duty is determined by looking at all the facts, with the major emphasis on the character of the employee's job as a whole.
 - b. Important **factors** to consider when determining the **primary duty** include:

- the relative importance of the exempt duties as compared with other types of duties;
 - the amount of time spent performing exempt work;
 - the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other non-exempt workers for the same kind of nonexempt work.
 - The amount of time spent performing exempt work can be a useful guide, and employees who spend more than 50 percent of their time performing exempt work generally will satisfy the primary duty requirement. Time alone, however, is not the sole test, and nothing in the regulations requires exempt employees to spend more than 50 percent of their time performing exempt work.
- c. The new rules define **management** by providing the following examples;
- Management includes activities related to supervising employees such as interviewing, selecting, and training of employees
 - Setting and adjusting pay rates and work hours
 - Conducting performance appraisals
 - Handling employee complaints and grievances;
 - Disciplining employees
 - Functions related to running or servicing a business such as determining the merchandise to be bought, stocked and sold
 - Planning and controlling the budget
 - Monitoring or implementing legal compliance measures
- d. The new rules define **customarily recognized department or subdivision**. A department or subdivision has a permanent status and continuing function.

- The subdivision need not be physically within the employer's establishment and may move from place to place.
 - The mere fact that the employee works in more than one location does not invalidate the exemption. If an executive supervises employees in a recognized unit, it does not matter if some of the employees are drawn from other recognized units.
 - Continuity of the same subordinate personnel is not essential to the existence of a recognized unit.
 - The employee in charge of each branch establishment is in charge of a recognized subdivision
 - On the other hand, a mere collection of employees assigned from time to time to a specific job or series of jobs is not a recognized subdivision.
- e. The new rules define **customarily and regularly** as a frequency that must be greater than occasional but which may be less than constant. Tasks or work performed "customarily and regularly" include work normally and recurrently performed every workweek; it does not include isolated or one-time tasks.
- Thus, normally, an exempt executive employee must direct the work of other employees at least once a week, but not every day.
 - Also, an exempt executive will not lose the exemption if an occasional week passes during which the executive does not give direct instructions to a subordinate.
- f. The new rules define the term "**two or more other employees**". This term means that the exempt manager must supervise two full-time employees or the equivalent.
- Full-time generally means 40 hours per week.

- However, the Department will recognize industry standards defining full-time employment as 37 ½ hours or 35 hours per week
 - Supervision can be distributed among two or more exempt executives, as long as each executive is responsible for supervising 80 work hours of other employees each week.
- g. Under the new rules factors are given to determine whether one meets the **particular weight standard**. Factors include, but are not limited to:
- Whether it is part of the employee's job duties to make suggestions and recommendations
 - The frequency with which suggestions and recommendations are made or requested
 - The frequency with which the employee's suggestions and recommendations are relied upon
 - Suggestions and recommendations may be reviewed by a higher level manager
 - The exempt executive need not have authority to make the ultimate decision
 - Making an occasional suggestion regarding a change in status of a co-worker does not meet the "particular weight" standard
- h. How to classify employees who perform both exempt management duties and nonexempt duties.
- The regulations state that a manager who performs both exempt and nonexempt work at the same time is not automatically disqualified from the executive exemption.
 - Generally, the exempt executives themselves make the decision regarding when to perform nonexempt duties while still remaining responsible for the success or failure of business operations.

- In contrast, the nonexempt employee generally is directed by a supervisor to perform the exempt work or performs the exempt work for defined time periods.
 - i. Business Owners who are exempt
 - Employees who own at least 20-percent equity in a business and **are actively engaged** in the management of the enterprise are exempt executives.
2. The **Administrative Exemption** applies only if: the employee's **primary duty** is the performance of office or non-manual work directly related to the **management or general business operations** of the employer or the **employer's customers**; and the employee's primary duty includes the exercise of **discretion and independent judgment** with respect to matters of significance.
- a. The phrase "**management or general business operations**" refers to the type of work the employee performs.
 - To meet this requirement, the employee must perform work that is directly related to assisting with the running or servicing of the business.
 - This type of work is different, for example, from working on a manufacturing production line or selling a product in a retail or service establishment.
 - b. The regulations explain that the term "**employer's customers**" means that employees who are acting as advisors or consultants to their employer's clients or customers also may be exempt. This would include, for example, those working as tax experts or financial consultants.
 - c. Exercising "**discretion and independent judgment**" generally involves an employee comparing and evaluating possible courses of conduct, and acting or making a decision after the various possibilities have been considered.

- In determining whether or not an employee exercises discretion and independent judgment, all the facts involved in the particular employment situation must be considered.
 - The term implies that the employee has authority to make an independent choice, free from immediate direction or supervision.
 - However, employees can exercise discretion and independent judgment even if their decisions or recommendations are reviewed, and occasionally reversed, at a higher level.
- d. Factors to determine whether an employee exercises discretion and independent judgment, whether the employee:
- Has authority to formulate, affect, interpret, or implement management policies or operating practices;
 - Carries out major assignments in conducting the operations of the business;
 - Performs work that affects business operations to a substantial degree;
 - Has authority to commit the employer in matters that have significant financial impact;
 - Has authority to waive or deviate from established policies and procedures, without prior approval;
 - Has authority to negotiate and bind the company on significant matters;
 - Provides consultation or expert advice to management; is involved in planning long- or short-term business objectives;
 - Investigates and resolves matters of significance on behalf of management; and
 - Whether the employee represents the company in handling complaints, arbitrating disputes or resolving grievances.

- e. Discretion and independent judgment does not include;
 - Use of skill in applying well-established techniques, procedures or specific standards described in manuals or other sources.
 - Clerical or secretarial work, recording or tabulating data, or performing other mechanical, repetitive, recurrent or routine work.
- f. Using a manual, however, does not automatically disqualify an employee from the Section 13(a)(1) exemptions. Exempt employees may use manuals, guidelines or other established procedures containing or relating to highly technical, scientific, legal, financial or other similarly complex matters that can be understood or interpreted only by those with advanced or specialized knowledge or skills.
- g. The term “**matters of significance**” refers to the level of importance or consequence of the work performed.
- h. **Insurance claims adjusters** generally meet the duties requirements for the administrative exemption if they perform work such as:
 - interviewing insureds, witnesses and physicians;
 - inspecting property damage;
 - reviewing factual information to prepare damage estimates;
 - evaluating and making recommendations regarding coverage of claims;
 - determining liability and total value of a claim;
 - negotiating settlements; and
 - making recommendations regarding litigation.
- i. **Financial services employees** may meet the duties requirements for the administrative exemption if their duties include:
 - collecting and analyzing information regarding the customer’s income, assets, investments or debts;

- determining which financial products best meet the customer's needs and financial circumstances;
- advising the customer regarding the advantages and disadvantages of different financial products; and
- marketing, servicing or promoting the employer's financial products.
- However, a financial services employee whose primary duty is selling financial products does not qualify for the administrative exemption.

j. **Human resource managers** who formulate, interpret or implement employment policies generally meet the administrative duties requirements, but personnel clerks who "screen" applicants to obtain data regarding minimum qualifications and fitness for employment, but make no hiring decisions, generally are not exempt administrative employees.

3. The **learned professional exemption** applies only if the employee's **primary duty** is the performance of work requiring **advanced knowledge** in a **field of science or learning** which is **customarily** acquired by a **prolonged course of specialized intellectual instruction**.

a. **"Advanced knowledge"** means work that is predominately intellectual in character, and which includes work requiring the consistent exercise of discretion and judgment.

- An exempt professional employee generally uses the advanced knowledge to analyze, interpret or make deductions from varying facts or circumstances.
- Work involving routine mental, manual, mechanical or physical work is not work requiring advanced knowledge.
- Advanced knowledge cannot be attained at the high school level.

b. **"Prolonged course of specialized intellectual instruction"** means that the learned professional exemption is limited to

professions where specialized, academic training is a standard prerequisite for entering the profession. The best evidence that an employee meets this requirement is possession of the appropriate academic degree.

- The learned professional exemption is not available for occupations that may be performed with only the general knowledge acquired by an academic degree in any field; knowledge acquired through an apprenticeship; or training in the performance of routine mental, manual, mechanical or physical processes.
 - The exemption also does not apply to occupations in which most employees acquire skill by experience.
- c. “Customarily” means that this exemption is also available to employees in such professions who possess substantially the same knowledge level and perform substantially the same work as the degreed employees, but who attain the advanced knowledge through a combination of work experience and intellectual instruction.
- Such employees may include the occasional lawyer who has not gone to law school, or the occasional chemist who does not have a degree in chemistry.
- d. The learned professional exemption applies to any employee who holds a valid license or certificate permitting the practice of medicine (also interns and residents).

4. The **Creative Professional Exemption** applies only if the employee’s **primary duty** is the performance of work requiring **invention, imagination, originality or talent** in a **recognized field of artistic or creative endeavor**.

- a. The **recognized fields of artistic or creative endeavor** include music, writing, acting and the graphic arts. Thus, exempt

creative professionals include musicians, composers, conductors, novelists, screen writers, actors, painters and photographers.

- b. The requirement of “**invention, imagination, originality or talent**” distinguishes the creative professions from work that primarily depends on intelligence, diligence and accuracy.
 - The creative professional exemption also does not apply if the employee’s work can be produced by a person with general manual ability and training.
 - Determination of exempt creative professional status must be made on a case-by-case basis, based on the extent of the invention, imagination, originality or talent exercised by the employee.
- c. **Journalists** may be exempt if they perform on-air in radio or television, conduct investigative interviews, analyze or interpret public events, or write editorials, opinion columns or commentary.

Much of the information in this document was obtained from the following website.

<http://www.dol.gov/esa/regs/compliance/whd/fairpay/seminar.htm>